No. 14,109

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUIS E. WOLCHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING

(Or, If a Rehearing Be Denied, for a Stay of Mandate).

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To the Honorable William Healy, William Orr and Walter L. Pope, Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant hereby respectfully petitions for a rehearing of the above cause, decided on December 28, 1954, on the ground that the opinion of this Court is in direct conflict with decisions of the Supreme Court, prior decisions of the above entitled Court, and decisions from other circuits. Also, that the reasoning used is not in conformity to the law and the facts.

THE OPINION UPHOLDING THE COMPLAINED OF INSTRUCTION IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THE SUPREME COURT, THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

This Court's opinion, upholding the giving of the instruction which told the jury to find the defendant guilty or not guilty, depending on whether credence should be given to defendant's testimony and story, is erroneous and contrary to all prior decisions for each of the following reasons:

1. The opinon holds no error in the complained of instruction because the general instructions fully covered the situation and that

> "* * * in the light of the accompanying instructions the jury could not rationally have understood the particular passage as shifting the burden of proof to the defendant, or as authorizing them to disregard frailties in the government's proof." (p. 3-4)

The instructions referred to in the opinion told the jury (i) The presumption is that the defendant is innocent, etc.; that the Government has the burden of proof; (ii) that the burden of proof never shifts to the defendant; (iii) that the defendant has no obligation to go forward and prove his innocence; (iv) the charge as contained in the indictment; (v) that the Government has the burden of proving the elements of the charge; (vi) the distinctions between net income and taxable income; (vii) that the Government need only prove a substantial amount of net income wilfully evaded by defendant; and (viii) the contentions of the Government and the defense.

Immediately following the foregoing the Court then gave the complained of instruction, to-wit:

> "So that in my opinion brings the issue of the case down to a very simple (question), and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, the issue is whether you do or do not believe the testimony and the story told by the defendant in the case. If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty."

In other and simple words, the judge told the jury that in his opinion all they had to determine was whether the defendant's testimony was to be believed, if not they should find the defendant guilty. This instruction was most prejudicial and, undoubtedly, was accepted and acted upon by the jury.

A comparable situation is presented in the case of *Bollenbach v. United States,* 326 U.S. 607, 612, where our Supreme Court in no uncertain terms condemns such procedure:

> " 'The influence of the trial judge on the jury is necessarily and properly of great weight.' Starr v. United States, 153 US 614, 626, 38 L ed 841, 845, 14 S Ct 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not

> cured by a prior unexceptional and unilluminating abstract charge."

So here, despite the prior portions of the charge, when the judge told the jury that *in his opinion there was only one issue in the case*—the truth or falsity of defendant's story and testimony—the jury beyond a doubt must have accepted this as the standard by which they arrived at the verdict of guilty and appended thereto a recommendation of leniency.

In practically every case where a similar instruction has been given, the Courts have held it to be reversible error, although other portions of the charge correctly set forth the law as to burden of proof, presumption of innocence, etc.

This Court has assumed that the jury did not construe the instruction as telling them to find a verdict on the truth or falsity of defendant's testimony and in disregard of other evidence in the case; yet, this is exactly what the instruction stated. In the *Bollenbach* case, supra, p. 614, it is stated:

> "It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. A charge should not be misleading."

Here, it is "a long jump at guessing" to hold that the jury did not exactly follow the Court's erroneous charge and determine the issue solely on the truth or falsity of defendant's testimony. This is exactly what the instruction told the jury to do and, as stated in *Estep v. United States,* 327 U.S. 114, 136:

> "These words can only mean what they appear to mean if they are read as ordinary words should be read. Ordinary words should be read with their common, everyday meaning when they serve as directions for ordinary people."

In *Bihn v. United States,* 328 U.S. 633, the defendant was charged with conspiracy involving the stealing of ration coupons; she testified in her own behalf. The trial judge gave all the standard instructions on presumption of innocence, burden of proof, etc. (p. 637); then the Court told the jurors they had a right to consider whether she stole the coupons or someone else did, whether she stole them and who did if she didn't, that the jurors were to decide that. The Supreme Court reversed, holding that the correct instructions did not cure the erroneous charge which *could have been construed by the jury* as meaning that if they did not believe the defendant's testimony they must find that she did the stealing.

In *Balman v. United States* (8 Cir.), 94 F. 2d 197, the Court held that the charge in its entirety was full and correct (p. 199) but reversed the cause because the Court instructed the jury that it was their function to determine whether the defendant's explanation was true or untrue.

In *Olender v. United States,* 210 F.2d 795, this Court held a comparable instruction to be erroneous although the Court had given full and generous instructions on burden of proof, presumption of innocence, reasonable doubt, etc.

In *Ward v. United States* (5 Cir.), 96 F. 2d 189, correct general instructions were given but the cause was reversed because a portion thereof was susceptible of the interpretation of requiring the defendant to convince the jury that he was not guilty instead of requiring the United States to convince them that he was guilty.

And to like effect are the cases cited and quoted from on pages 4 to 8 of Appellant's Closing Brief filed herein.

It follows that the opinion of the Court herein is in conflict with prior decisions in holding that the general charge was sufficient to prevent the jury from construing the complained of instruction contrary to its express wording, to-wit, that the issue was whether the jury believed or disbelieved the defendant's story.

2. The opinion of this Court states that:

> "the jury could not rationally have understood the particular passage as shifting the burden of proof to the defendant, or as authorizing them to disregard frailties in the government's proof." (p. 3)
>
> "The instruction could hardly be understood by the jury as telling them to disregard these, or other circumstances in evidence, which might tend to corroborate appellant's account of his transactions or the asserted necessity of his paying overceiling prices." (p. 5)

By the foregoing, this Court has substituted the trained judicial minds of its judges for the untrained lay minds of the jurors in construing and applying

the trial Court's instructions. This cannot be done. The only matter to be considered is the effect the instruction had on the jury and the way the jurors *may have construed it.*

In *Olender v. United States,* 210 F. 2d 795, this Court, in construing an instruction comparable to but less damaging than the instruction given herein, stated:

> "While the words of the instruction did not in terms shift the burden of proof to the defendant, *they might well have had that effect in the minds of the jurors.*" (Italics ours.)

In *Bihn v. United States,* 328 U.S. 633, 637, our Supreme Court asserts:

> "We assume the charge might not be misleading or confusing to lawyers. But the probabilities of confusion to a jury are so likely (cf. Shepard v. United States, 290 US 96, 104, 78 L ed 196, 201, 54 S Ct 22) that we conclude that the charge was prejudicially erroneous."

And later in the *Bihn* case the Supreme Court states:

> "Or to put the matter another way, *the instruction may be read as telling the jurors* that, if petitioner by her testimony had not convinced them that someone else had stolen the ration coupons, she must have done so." (Italics ours.)

So here, the opinion is in error in not construing the instruction as it may have been construed by the jurors and in not giving to the words of the instruction their common every day meaning, to-wit, that

in the Judge's opinion the only issue to be determined was the truth or falsity of defendant's testimony.

At the very least the instruction was equivocal. Assuming that it could be construed in the manner this Court has determined, nevertheless, it is also susceptible of meaning that the jury should determine guilt or innocence on whether they believed or disbelieved appellant's testimony. In *Bollenbach v. United States, supra*, it is held

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

and in *Etting v. Bank of the United States,* 11 Wheat. 59, 75, 6 L ed 419, 422, the Court states:

> "But, if the judge proceeds to state the law, and states it erroneously, his opinion ought to be revised; and if it can have had any influence on the jury, their verdict ought to be set aside."

While in *Beaver v. Taylor,* 1 Wall. 637, 17 L ed 601, 603, the Supreme Court held that

> "If they (instructions) have misled the jury to the injury of the party against whom their verdict is given, the error is fatal."

Here, giving the instruction the plain meaning its words implied and conveyed to the jury, it must have had a great influence on the jury and worked irreparable injury to appellant and, under the foregoing cases, requires a reversal of the judgment.

3. The opinion holds that the instruction neither in substance nor effect told the jury to disregard all evidence other than the testimony of the defendant

himself (p. 5). The opinion then states "the problem confronting the jury was not whether whiskey was difficult to obtain or whether appellant was able to obtain it. Admittedly he did obtain the whiskey in question, albeit at what he said was a heavy over-ceiling price". While it is true defendant did obtain the whiskey in question, the problem confronting the jury was not whether he could or could not procure whiskey but whether he could procure whiskey without paying an over-ceiling price therefor when regular liquor dealers could not do so.

The opinion states that in view of the prima facie case presented by the Government "obviously in such condition of the record he had some explaining to do" (p. 4). Granting that when the Government made a prima facie case the burden of going forward and explaining that no taxable profit was made as a result of the whiskey transactions was on the defendant, but *this does not mean that he had to go forward with the testimony or that, in the absence of so proceeding, the jury were authorized to find him guilty.* A prima facie case merely means a case sufficient to be submitted to the jury, it then being the jury's duty to determine whether they believed the evidence introduced by the prosecution or whether it was sufficient to establish guilt beyond a reasonable doubt (*McCoy v. Courtney,* 25 Wash. 2d 956; 172 P. 2d 596).

In *Balman v. United States* (8 Cir.), 94 F. 2d 197, the Court instructed the jury that proof that defendant was in possession of recently stolen property raised a presumption of guilty knowledge in the ab-

sence of any explanation and it was for the jury to determine whether defendant's explanation as given at the trial was sufficient to overcome the presumption. The Appellate Court at page 199 held as follows:

> "As applied to the case under consideration, Judge Sanborn, in McAdams v. United States, supra, states the rule thus: 'The fact that the defendant had come into the possession of these cars shortly after they were stolen was a circumstance to be considered by the jury in connection with all of the other circumstances of the case in determining the question of his guilt or innocence. It was to be given its natural probative value and nothing more. It created at no time any presumption of law that the defendant knew that the cars were stolen, and, although it might have justified the inference, *it compelled no finding to that effect, even though he failed to give a satisfactory explanation.*' " (Italics ours.)

Lastly, this Court held "if the jury were convinced beyond a reasonable doubt that there was no truth in *appellant's defense,* then, certainly as the Court advised them, they were justified in returning a verdict of guilty" (p. 5).

For all the reasons hereinabove stated, this holding of the Court is erroneous. The complained of instruction did not refer to "appellant's defense". It referred to appellant's story and testimony. Furthermore, the jury could have entirely discredited appellant's testimony and still not have believed the prosecution's witnesses or have found that the prosecu-

tion's case failed to establish the charge beyond a reasonable doubt.

The instruction did not tell the jury that if they found no truth in appellant's defense they should convict; it told the jury that if they did not believe appellant's testimony they should convict, thus limiting the deliberations of the jury to appellant's testimony.

THE OPINION IS IN ERROR IN HOLDING THE TRIAL JUDGE WAS CORRECT IN REFUSING TO REOPEN THE CASE.

This Court holds that no error was committed in refusing to reopen the case in order that appellant could call Gersh as a witness. This Court's reasoning is that appellant was familiar with Gersh's testimony given at the former trial; that he knew where Gersh lived and he had had an opportunity to subpoena Gersh. This does not correctly portray the situation.

While it is true that appellant could have subpoenaed Gersh prior to the trial, the question facing the trial Judge and the appellant was not whether Gersh should have been called as a witness but it was the attempt of appellant to establish the bank records of Gersh. This appellant attempted to do by calling the government agent who had been in charge of the investigation from its inception and this agent denied acquiring any knowledge of the bank accounts until the conclusion of the first trial, even though such bank accounts had been offered in evidence by the prosecution at the first trial.

The important point is the refusal of the Court to allow appellant to establish these bank accounts and thus offer them into evidence. The attempt to get a continuance in order to call Gersh was just one step in this endeavor. No one disputes the importance of Gersh's bank accounts to the defense and it was the duty of the trial Court in the interests of justice, when all other attempts of the defense to establish these bank accounts had failed, to grant a reasonable continuance in order to produce the owner of these accounts to identify the records. As was said by our Supreme Court in its recent decision in *Holland v. United States,* decided December 6, 1954, 99 L ed (advance) 127, 137:

> "It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done."

It is submitted that the opinion of this Court is erroneous and in conflict with other pertinent decisions on the subjects involved. Appellant was denied a fair trial at the second trial of his case just as he was denied a fair trial at the first trial of his case. The multiplication of trials cannot take the place of a trial conducted in accordance with the standards provided by law and under proper judicial guidance of the jury. A rehearing should be granted.

In the event of a denial of this petition appellant intends to apply to the Supreme Court of the United States for a writ of certiorari and therefore prays for

a stay of a mandate of this Court for thirty days in order to enable appellant to make such application.

Dated, San Francisco, California,
January 21, 1955.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 21, 1955.

Leo R. Friedman,
Counsel for Appellant and Petitioner.